STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 373-4147

IN THE MATTER OF:

Docket No. 14-008619 EDW

[redacted] [redacted] [redacted]

Appellant
_____/

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 42 CFR 431.200 *et seq*., and upon the Appellant's request for a hearing.

After due notice, a hearing was held on [redacted], Appellant's daughter, appeared and testified on Appellant's behalf. Appellant also testified on her own behalf. [redacted], Quality and Training Manager, represented the Department of Community Health's Waiver Agency, [redacted] ("Waiver Agency" or [redacted]"). [redacted] registered nurse/supports coordinator, also testified as a witness for the Waiver Agency.

ISSUE

Did the Waiver Agency properly deny Appellant's request for additional Community Living Supports (CLS)?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. [redacted] is a contract agent of the Michigan Department of Community Health and is responsible for waiver eligibility determinations and the provision of MI Choice waiver services in its service area.

2. Appellant is an [redacted] year-old Medicaid beneficiary who has been diagnosed with congestive heart failure; coronary artery disease; chronic obstructive pulmonary disease; hypertension; anxiety; depression; and diabetes mellitus. (Respondent's Exhibit A, pages 11-12).

3. Appellant has been receiving services through the Waiver Agency, including [redacted] hours per week of CLS. (Respondent's Exhibit A, page 21; Respondent's Exhibit B, page 1).

4. Appellant's representative/daughter is her CLS worker. (Respondent's Exhibit B, page 1).

5. After suffering from a stroke, Appellant was admitted to the hospital on [redacted] and she remained in the hospital until being discharged on [redacted]. (Respondent's Exhibit D, page 1).

6. Upon Appellant being discharged from the hospital, Appellant was approved for physical therapy; occupational therapy; speech and language therapy; and a home health aide [redacted] hours a week; for [redacted] weeks. (Respondent's Exhibit E, page 1; Testimony of [redacted].

7. Per the report of the registered nurse who went out to Appellant's home on [redacted], Appellant and her representative declined the use of any home health aide. ((Respondent's Exhibit E, page 1; Testimony of [redacted].

8. However, according to Appellant's representative, the only assistance she ever declined was having a nurse come out to check Appellant's blood pressure, which Appellant's representative could do on her own. (Testimony of Appellant's representative).

9. On [redacted] staff performed an assessment in Appellant's home with her and her representative. (Respondent's Exhibit A, pages 1-25).

10. During that assessment, Appellant and her representative requested additional CLS hours through the Waiver Agency. (Testimony of Appellant's representative; Testimony of [redacted]).

11. Appellant and her representative did not identify the specific increase they were seeking at the time, but Appellant's representative testified during the hearing that they wanted an additional [redacted] hours of CLS per week. (Testimony of Appellant's representative).

12. On [redacted], the Waiver Agency sent Appellant written notice that her request for additional CLS was denied. (Respondent's Exhibit C, page 1).

13. On [redacted], the Michigan Administrative Hearing System (MAHS) received the request for hearing filed by Appellant and her representative in this matter.

CONCLUSIONS OF LAW

The Medical Assistance Program is established pursuant to Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). It is administered in accordance with state statute, the Social Welfare Act, the Administrative Code, and the State Plan under Title XIX of the Social Security Act Medical Assistance Program.

Appellant is claiming services through the Department's Home and Community Based Services for Elderly and Disabled. The waiver is called MI Choice in Michigan. The program is funded through the federal Centers for Medicare and Medicaid Services to the Michigan Department of Community Health (Department). Regional agencies, in this case Senior Alliance, function as the Department's administrative agency.

> Waivers are intended to provide the flexibility needed to enable States to try new or different approaches to the efficient and cost-effective delivery of health care services, or to adapt their Programs to the special needs of particular areas or groups of recipients. Waivers allow exceptions to State plan requirements and permit a State to implement innovative programs or activities on a time-limited basis, and subject to specific safeguards for the protection of recipients and the program. Detailed rules for waivers are set forth in subpart B of part 431, subpart A of part 440, and subpart G of part 441 of this chapter.
>
> *42 CFR 430.25(b)*

A waiver under section 1915(c) of the Social Security Act allows a State to include as "medical assistance" under its plan, home and community based services furnished to recipients who would otherwise need inpatient care that is furnished in a hospital, SNF (Skilled Nursing Facility), ICF (Intermediate Care Facility), or ICF/MR (Intermediate Care Facility/Mentally Retarded), and is reimbursable under the State Plan. *See* 42 CFR 430.25(c)(2).

Types of services that may be offered include:

> Home or community-based services may include the following services, as they are defined by the agency and approved by CMS:
>
> - Case management services.
> - Homemaker services.
> - Home health aide services.
> - Personal care services.
> - Adult day health services

- Habilitation services.
- Respite care services.
- Day treatment or other partial hospitalization services, psychosocial rehabilitation services and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness, subject to the conditions specified in paragraph (d) of this section.

Other services requested by the agency and approved by CMS as cost effective and necessary to avoid institutionalization.

42 CFR 440.180(b)

Here, Appellant has been receiving CLS through the Waiver Agency and, with respect to such services, the applicable version of the Michigan Medicaid Provider Manual (MPM) states:

4.1.I. COMMUNITY LIVING SUPPORTS

Community Living Supports (CLS) services facilitate a participant's independence and promote reasonable participation in the community. Services can be provided in the participant's residence or in a community setting to meet support and service needs.

CLS may include assisting, reminding, cueing, observing, guiding, or training with meal preparation, laundry, household care and maintenance, shopping for food and other necessities, and activities of daily living such as bathing, eating, dressing, or personal hygiene. It may provide assistance with such activities as money management, nonmedical care (not requiring nurse or physician intervention), social participation, relationship maintenance and building community connections to reduce personal isolation, non-medical transportation from the participant's residence to community activities, participation in regular community activities incidental to meeting the participant's community living preferences, attendance at medical appointments, and acquiring or procuring goods and services necessary for home and community living.

> CLS staff may provide other assistance necessary to preserve the health and safety of the participant so they may reside and be supported in the most integrated and independent community setting.
>
> CLS services cannot be authorized in circumstances where there would be a duplication of services available elsewhere or under the State Plan. CLS services cannot be authorized in lieu of, as a duplication of, or as a supplement to similar authorized waiver services. The distinction must be apparent by unique hours and units in the individual plan of services. Tasks that address personal care needs differ in scope, nature, supervision arrangements or provider type (including provider training and qualifications) from personal care service in the State Plan. The differences between the waiver coverage and the State Plan are that the provider qualifications and training requirements are more stringent for CLS tasks as provided under the waiver than the requirements for these types of services under the State Plan.
>
> When transportation incidental to the provision of CLS is included, it must not also be authorized as a separate waiver service. Transportation to medical appointments is covered by Medicaid through the State Plan.
>
> Community Living Supports do not include the cost associated with room and board.
>
> *MPM, July 1, 2014 version*
> *MI Choice Waiver Chapter, pages 12-13*

However, while CLS are Medicaid covered services, Medicaid beneficiaries are still only entitled to medically necessary Medicaid covered services and the MI Choice Waiver did not waive the federal Medicaid regulation that requires that authorized services be medically necessary. *See* 42 CFR 440.230.

Here, it is undisputed that the Appellant has a need for some services and she has been continually authorized for CLS. Instead, the sole dispute is the amount of such services to be authorized, with the Waiver Agency having authorized [redacted] hours per week and Appellant arguing that her services should be increased by approximately [redacted] additional hours per week.

Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in denying her request for additional services. Moreover, this Administrative Law Judge is limited to reviewing the Waiver Agency's decision in light of the information it had at the time it made that decision.

According to the Waiver Agency's witnesses, the request for additional CLS was denied as Appellant did not suffer a significant decline after her stroke and, to the extent her need for assistance did increase, that increased need could have been met through the home health aide that Appellant and her representative declined. The Waiver Agency's witnesses also testified that the Waiver Agency is the payor of last resort and that, before authorizing MI Choice services, a participant must take full advantage of other services and fund sources.

In response, Appellant's representative testified that Appellant needs more attention and time since her stroke, with Appellant now requiring more assistance in some tasks, such as bathing, that her daughter was already assisting her with while also requiring assistance with new tasks, such as dressing and toileting. Appellant's representative further testified that no home health aide was ever offered or declined, and that, while Appellant did utilize physical therapy, occupational therapy and speech therapy, she cannot do anything on her own now that those skilled therapies have ended.

The undersigned Administrative Law Judge finds that Appellant and her representative have failed to meet their burden of proof and that the Waiver Agency's decision must therefore be affirmed. As properly testified to by the Waiver Agency's witnesses, a participant must take full advantage of other services and fund sources prior to seeking additional waiver services and, in this case, Appellant and her representative declined two hours a week with a home health aide that would have met Appellant's request for additional care. Appellant's representative disputes declining any services, but her testimony is contradicted by the report of the registered nurse who followed up with the Appellant after her discharge from the hospital and the undersigned Administrative Law Judge does not find Appellant's representative credible on that issue. Given the availability of a home health aide, additional CLS were not medically necessary and the Waiver Agency properly denied Appellant's request.

Moreover, while Appellant's representative also appears to argue that the services should be increased because Appellant's circumstances have changed since the denial and Appellant cannot do anything on her own now that her skilled therapies have stopped, this Administrative Law Judge is limited to reviewing the Waiver Agency's decision in light of the information it had at the time it made that decision. Therefore, any subsequent changes are immaterial to this decision and order.

To the extent Appellant's circumstances have changed or her need for assistance has increased since the termination of the skilled therapies, she can always re-request that her services be increased. With respect to the decision at issue in this case, however, the denial must be affirmed given the information available at the time.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly denied Appellant's request for additional services.

IT IS THEREFORE ORDERED that:

The Waiver Agency's decision is **AFFIRMED**.

Steven Kibit

Steven J. Kibit
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Community Health

Date Signed: [redacted]

Date Mailed: [redacted]

SK/db

cc: [redacted]

***** NOTICE *****

The Michigan Administrative Hearing System may order a rehearing on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. The Michigan Administrative Hearing System will not order a rehearing on the Department's motion where the final decision or rehearing cannot be implemented within 90 days of the filing of the original request. The Appellant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt of the rehearing decision.